IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE A.K.BASHEER

MONDAY, THE 3RD DECEMBER 2007 / 12TH AGRAHAYANA 1929

CRL.A.No. 168 of 2001()

CC.520/1998 of JUDL. MAGISTRATE OF FIRST CLASS-I, KOCHI
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APPELLANT - COMPLAINANT:

SIBY K.THOMAS, KEEKERIKATTU,
2/C-1, STAR PARK, CHETTICHIRA,
VYTTILA, COCHIN - 682 019.

BY ADV. SRI.M.A.ABDUL HAKHIM
SRI.SIBY J.MONIPPALLY

RESPONDENTS - ACCUSED & STATE:
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1. KAMALAM GOPALAN, 'VENUS', HOUSE NO.31/606,
KACHAPPALLY ROAD, VYTTILA, COCHIN - 682 019.

2. STATE OF KERALA, REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA,
COCHIN - 682 031.

BY PUBLIC PROSECUTOR SHRI AMJETH ALI
SRI.M.N.MATHEW FOR R1

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

vsv

A.K.BASHEER, J.

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Crl.A.No.168 OF 2001

- -

Dated this the 3rd day of December 2007

JUDGMENT

This appeal which is at the instance of the complainant in a prosecution under Section 138 of the N.I. Act is directed against the judgment of acquittal passed by the trial court.

2. The learned Magistrate while finding respondent No.1/accused not guilty held that the case set up by the appellant/complainant that he had advanced the cheque amount to the accused was not believable. It was further held that Ext.P1 was the blank cheque issued by the accused as security for the payment made by the complainant to the husband of the accused.

3. The point that arises for consideration in this appeal is whether the judgment of acquittal is legally sustainable.

4. The case of the complainant was that the accused had borrowed an amount of Rs.3,00,000/- from him. The accused had issued Ext.P1 cheque dated June 30, 1997 in discharge of the above debt. When the said cheque was presented for encashment, it was dishonoured due to insufficiency of funds in the account of

the accused. Though a statutory notice was issued by the complainant to the accused demanding payment, she had failed to discharge the liability. Hence the complaint.

5. The complainant was examined as PW1 and the Manager of the Bank was examined as PW2. Exts.P1 to P6 were marked on the side of the complainant. The accused and her husband were examined as DW1 and DW2 respectively and Ext.D1 was marked on the side of the defence.

6. The trial court accepted the case of the complainant that the cheque was dishonoured by the Bank due to insufficiency of funds in the account of the accused. It was further found that the complainant had complied with the statutory mandates before launching the prosecution. However, as mentioned earlier, the learned Magistrate took the view that the case of the complainant that he had advanced a sum of Rs.3,00,000/-to the accused was not believable.

7. In this context, it may be noticed that the accused, while she was examined as DW1, had admitted that she had put her signature in Ext.P1 cheque. Her husband, when examined as

DW2, deposed before the court that he had had a money transaction with the complainant during 1995-96 and in connection with that transaction he had handed over a blank signed cheque of his wife (Ext.P1) to the complainant as security. The specific case of DW2 before the court below was that he had repaid the entire amount borrowed by him from the complainant. But he conceded that he did not have any receipt with him to prove discharge.

8. In this context, it may be pertinent to note that in the course of cross examination of PW1/complainant, it was suggested to him that the money which was borrowed from him by DW2 had been repaid by the accused in three instalments. It was further suggested to the complainant that he had refused to return the cheque even after repayment of the money borrowed from him. The specific suggestion was that the complaint was filed by him utilizing the cheque which he had retained with him even after receipt of the money from the husband of the accused.

9. I have referred to the above aspects of the case as projected by way of defence by the accused only to show that the

defence set up by the accused and her husband was that the money advanced by the complainant had been repaid to him. In other words, the specific plea of the accused was one of discharge of the alleged liability of the husband of the accused. When a query was put to the learned counsel for the accused in the course of the argument whether the accused had discharged the said burden cast on her, the answer was that several documents produced by her husband in A.S.No.299/02 before this court will substantiate the above contention.

10. It is on record that the complainant had filed a suit for specific performance against the accused in connection with an agreement for sale of a residential building which belonged to the accused. Though the trial court had granted a decree for specific performance, this court in the appeal referred to above, had modified the decree. Instead of a decree for specific performance, the Division Bench of this court had granted a money decree in favour of the complainant and the defendant/accused was directed to return the advance of Rs.6,00,000/- received from the complainant with interest thereon. It is brought to my notice that

the complainant has put that decree in execution which is now pending before the local Subordinate Judge's court.

11. The case of the accused appears to be that in connection with the above transaction, she had handed over several blank papers, cheques, etc. to the complainant through her husband. According to her, one of the cheques issued by her in connection with the above transaction might have been used by the complainant for the purpose of launching this prosecution against her. It is in this connection that the learned counsel has made a request to peruse those documents which the accused had allegedly produced before the Division Bench a few years ago. Curiously, the accused had not bothered to produce any of such documents before the trial court. Learned counsel submits that if those documents are not considered, the accused may not have a case in this appeal.

12. In this context, it may also be noticed that the accused did not have a case that the Ext.P1 cheque was a forged document. But in the course of argument, learned counsel for the accused has attempted to develop a further case. It is contended

by him that the husband of the accused/DW2 has launched a prosecution against the complainant and a few other so called money lenders in Cochin city and the said complaint is now pending before the Additional Chief Judicial Magistrate's Court, Ernakulam. He further submits that he has moved a petition before that court for a direction to the Judicial Magistrate of First Class before whom this case was tried to send the Ext.P1 cheque to the Forensic Science Laboratory. Learned counsel has filed Crl.M.A.12727/07 in this appeal with a prayer to send Ext.P1 cheque to the Judicial Magistrate of First Class No.I, Kochi so that he may forward the same to the Additional Chief Judicial Magistrate's Court, Ernakulam before which the case referred to above against the complainant and a few other money lenders is stated to be pending.

13. Curiously, respondent No.1/accused did not have a case before the trial court that Ext.P1 cheque was forged or that any alteration or manipulation had been made in the same. The case of the accused was that the cheque was not supported by any consideration. But at the same time, it was admitted by her that

she had signed the cheque and that it was delivered to the complainant in connection with a money transaction between her husband and the complainant. In chief examination, PW1 had categorically stated that the accused had borrowed Rs.3,00,000/- from him and in discharge of the said liability she had issued Ext.P1 cheque. This assertion made by PW1 was not controverted at any point of time.

14. But the learned Magistrate placed undue reliance on the property transaction between the complainant and the accused which culminated in the decree referred to earlier. According to the learned Magistrate, it was improbable that the complainant would have advanced money to the accused at a time when the property transaction was not yet complete. But the case of the complainant was that he and the accused, especially the husband of the accused, had been maintaining a very cordial relationship and it was therefore that the complainant had not insisted for execution of the document on the expiry of the deadline in the agreement for sale. However, the complainant was aware that the husband of the accused was due to receive large amount of money

from the Port Trust in connection with certain works executed by him as a contractor. Both of them were engineers and the husband of the accused had been purchasing lot of sanitary wares from the business establishment of the complainant for the last few years. The complainant in his chief examination had further stated that the money was paid to the accused on three occasions. On two occasions, when the payment was made, the accused had issued cheque for the amount advanced. Ultimately, when the third instalment was made, one consolidated cheque for Rs.3,00,000/- was issued. These assertions made by the complainant were never seriously disputed or challenged. More importantly, evidence adduced by PW1 remained uncontroverted. The accused had not discharged the burden cast on her under Section 139 of the Act. Moreover, the presumption available in favour of the holder of a cheque under Section 118 of the Act was also lost sight of by the learned Magistrate.

15. It is further seen that the learned Magistrate had referred to some 'visible differences' in the signature in Ext.P1 and other writings as noticed already. The accused had never

raised any such contention with regard to the entries in the cheque or the signature therein. Therefore, the learned Magistrate, in my view, was not at all justified in trying to pick holes in the case of the complainant.

16. Learned counsel for the accused points out that a request was made before the learned Magistrate to send the cheque to the Handwriting expert for opinion. But as noticed already, the accused had never disputed her signature in the cheque in the course of the trial. She had no case that the entries therein were in any way tampered with or manipulated. Therefore, the learned Magistrate in my view was justified in rejecting the prayer made by the accused in this regard.

17. Learned counsel for the accused has invited my attention to the decision of their lordships in the Supreme Court reported in **Prakashan V. Surenderan [2007 (4) KLT 502 (SC)]** in which it has been held that if two views are possible, the appellate court shall not reverse a judgment of acquittal only because another view is possible. In the case on hand, the only view possible is that the accused is liable to be convicted for the offence

punishable under Section 138 of the Act on the basis of the evidence adduced before the court below. In other words, no two views are possible at all in the facts and circumstances of the case.

18. Having perused the entire materials on record, I have no hesitation to hold that the order of acquittal passed by the learned Magistrate is wholly unsustainable. The complainant in my view, had established his case satisfactorily. The accused had not rebutted the presumption available under Section 139 of the Act. Therefore, the order of acquittal is liable to be set aside. I do so.

19. The respondent no.1/accused is found guilty under Section 138 of the N.I. Act. She is accordingly convicted. Learned counsel for the accused submits that respondent no.1 had to suffer conviction in yet another prosecution under Section 138 of the N.I. Act, because of her husband. She was sentenced to undergo imprisonment till the rising of the court apart from the liability to pay compensation in that case. It is also pointed out that she is faced with several other litigations.

20. Learned counsel for the complainant submits that the

complainant is interested only in getting back the money advanced to the accused, and that too way back in the year 1997.

21. Having regard to the entire facts and circumstances, I am of the view that interest of justice will be met, if respondent/accused is sentenced to undergo imprisonment for one day and to pay reasonable compensation under Section 357(3) of the Code of Criminal Procedure.

22. In the result, the appeal is allowed. Respondent no.1 is convicted and sentenced to suffer imprisonment till the rising of the court and also shall pay a sum of Rs.3,25,000/- as compensation under Section 357(3) of the Code of Criminal Procedure. In default of payment, the respondent shall undergo simple imprisonment for six months.

Respondent no.1 shall appear before the trial court on or before October 10, 2008 and deposit the amount of compensation. The amount shall be released to the complainant on such deposit. On appearance of respondent No.1/accused, the learned Magistrate shall ensure that she suffers imprisonment till the rising of the court on that day. If the accused fails to comply with

the above direction, learned Magistrate shall execute the default sentence forthwith.

(A.K.BASHEER, JUDGE)

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A.K.BASHEER, J.

Crl.A.No.168 OF 2001

JUDGMENT

Dated 3rd Dec. 2007